

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ORLANDO JERMAINE MORGAN,

Defendant-Appellant.

UNPUBLISHED

May 10, 2007

No. 268080

Wayne Circuit Court

LC No. 05-008753-01

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (second offense), MCL 750.227b. He was sentenced to five years' probation for the felon-in-possession conviction and five years' imprisonment for the felony-firearm conviction. He appeals as of right. Because sufficient evidence was introduced to support defendant's convictions, and because he was not denied the effective assistance of counsel, we affirm.

Defendant's convictions arise out of an incident wherein he and an unidentified co-actor were allowed into Amer Al-Amin and his wife's home, then demanded money from them. Defendant was armed with a handgun when he demanded money from Al-Amin. Defendant and his co-actor took the contents out of Al-Amin's home safe, tied Al-Amin and his wife's hands with duct tape, ordered them into a closet, and left in one of Al-Amin's cars.

Defendant was originally charged with felon in possession of a firearm, felony-firearm, larceny, and two counts of armed robbery. At the conclusion of the bench trial, the trial court opined that Al-Amin was attempting an insurance scam and that while defendant was armed during the incident, because he and his co-actor had permission to enter Al-Amin's home and take the items, no armed robbery occurred. Defendant was thus ultimately convicted of only the felon in possession and felony-firearm charges.

On appeal, defendant first argues that the evidence was insufficient to convict him of the two firearm offenses. We disagree.

"The evidence in a bench trial is sufficient if, when viewed in the light most favorable to the prosecutor, a rational factfinder could determine that each element of the crime had been proved beyond a reasonable doubt." *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105

(2001). Circumstantial evidence and reasonable inferences arising from the same may be sufficient to prove the elements of a crime. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

The felon in possession statute prohibits a person convicted of a specified felony from possessing a firearm if fewer than five years have passed since the person paid all fines, served all terms of imprisonment, and successfully completed all terms of probation or parole imposed for the violation.¹ MCL 750.224f(2); *People v Perkins*, 262 Mich App 267, 269-271; 686 NW2d 237 (2004). The elements of felony firearm, MCL 750.227b, are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). For purposes of his appeal, defendant challenges the “possession” element of these offenses.

Possession of a firearm can be actual or constructive, and may be proved by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). “Where conviction of an offense requires proof beyond a reasonable doubt that a defendant possessed a firearm, this element may be proven without the actual admission into evidence of the weapon.” *People v Hayden*, 132 Mich App 273, 296; 348 NW2d 672 (1984).

Viewed in a light most favorable to the prosecution, the testimony of Amer Al-Amin and his wife, Fetme Tanana, that defendant was armed with a gun, and Tanana’s testimony that defendant threatened to kill Al-Amin and his wife if they did not cooperate, was sufficient to enable the trial court to find the possession element for each conviction proven beyond a reasonable doubt. The credibility of the testimony was for the trial court to determine. See *In re Forfeiture of \$25,505*, 220 Mich App 572, 581; 560 NW2d 341 (1996). “It is beyond peradventure that the factfinder may choose to believe or disbelieve any witness or any evidence presented in reaching a verdict.” *People v Cummings*, 139 Mich App 286, 294; 362 NW2d 252 (1984). Regardless of the trial court’s ultimate finding that a staged robbery occurred, the testimony that defendant possessed a gun during the offense was not so inherently incredible that a reasonable person could not believe it. *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998).

Defendant also claims that he was denied the effective assistance of counsel. In considering this claim, we note that although this Court denied defendant’s earlier motion to remand for an evidentiary hearing, the trial court gave defendant an opportunity to make a record at sentencing of the basis for his claim.

A claim of ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004).

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523

¹ The parties stipulated that on the date of the incident, defendant was not eligible to possess a firearm.

NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).]

Defendant has given only cursory treatment to his claim of ineffective assistance of counsel, with little citation to the record. A defendant “may not leave it to this Court to search for a factual basis to sustain or reject his position.” *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). In any event, it is apparent from the record that defense counsel had a successful strategy at trial because the trial court agreed with his position that defendant feigned the robbery. Although the trial court rejected defense counsel’s argument that there was no credible evidence that defendant possessed a real gun, we are not persuaded that the outcome of the trial might have been different had defense counsel cross-examined witnesses and, in particular, Tanana, regarding her preliminary examination testimony or explored other matters probative of her credibility. In general, the questioning of witnesses is presumed to be a matter of trial strategy that will not be assessed with the benefit of hindsight. *Rockey*, *supra* at 76. Because we find no basis in the record for concluding that defendant was deprived of a substantial defense, defendant’s ineffective assistance of counsel claim cannot succeed. *Daniel*, *supra* at 58-59.

Affirmed.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto